U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 10445158

Date: APR. 16, 2021

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner claims to be a physical therapist and seeks second preference immigrant classification as a an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this EB-2 classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not qualify for classification as a professional holding an advanced degree or an individual of exceptional ability, and that she had not established that a waiver of the required job offer, and thus of the labor certification, would be in the national interest. On appeal, the Petitioner submits a brief asserting that the Director's findings were erroneous.

In these proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –
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> (A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will

> substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer –
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> (i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definition: "*Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii).

Furthermore, while neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884 (AAO 2016).[1] *Dhanasar* states that after a petitioner has established eligibility for EB-2 classification, U.S. Citizenship and Immigration Services (USCIS) may, as matter of discretion[2], grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

The Petitioner states that she is a physical therapist, utilizing techniques such as Pilates method, functional dermatology, and postural reeducation.[4] She intends to work with a healthcare facility in the United States to "provide expert advice and treatment to patients." From 2009 to 2017, she owned and operated a Pilates studio in Brazil that employed six individuals. She is currently employed in the United States as a Pilates instructor.[5]

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[1] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

[2] *See also Poursina v. USCIS*, No. 17-16579, 2019 WL 4051593 (Aug. 28, 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

[4] On the Form I-140, Immigrant Petition for Alien Worker, she lists her job title as "Physical Therapy Researcher."

[5] At time of filing, she was in the United States on a B-2 visitor visa, and commenced her employment as a Pilates instructor subsequent to the filing of the petition.

A. Member of the Professions Holding an Advanced Degree

In order to show that a petitioner holds a qualifying advanced degree, the petition must be accompanied by "[a]n official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(3)(i)(A). Alternatively, a petitioner may present "[a]n official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty." 8 C.F.R. § 204.5(k)(3)(i)(B).

Here, the Petitioner contends that meets this criterion by virtue of her undergraduate degree in physical therapy and her ten years of post-baccalaureate experience in the specialty. The Petitioner presented a copy of her diploma in physical therapy from [redacted] University in Brazil, awarded in December 2006, as well as her official academic record from the university. She also submitted an academic credentials evaluation from [redacted], equating her foreign academic coursework to a U.S. bachelor's degree in physical therapy.

Regarding her post-baccalaureate experience, the Petitioner claims that she owned and operated a Pilates studio [redacted] in Brazil from 2009 until the time of filing, where she employed six individuals. In support of this assertion, she submitted copies of foreign business documents, including the articles of organization and a location permit for her business. As evidence of her work experience, she submitted letters from three former employees. All three letters, written by [redacted], and [redacted] respectively, are written in the same format and are virtually identical in content, aside from each individual's respective positions and dates of employment. All three letters contain identical statements, such as "I personally witnessed [the Petitioner] carrying out the role of Pilates instructor and physiotherapist while employed at [redacted], and I attest that the foregoing is accurate and true," and "[t]here are no reasonable means to obtain records of [the Petitioner's] past employment at [redacted]." Although each of these individuals claims to have worked with the Petitioner for various periods between 2010 and 2017, the record contains no additional documentation corroborating their claimed employment, nor do their letters differentiate or describe in detail the amount of time the Petitioner spent performing Pilates instruction versus physiotherapy/physical therapy. The general assertions in these letters do not indicate how the Petitioner, as the studio owner, divided her time between the running of her business and her provision of Pilates instruction and physiotherapy services, nor do they specify the amount of time she devoted to performing physiotherapy services during the period they worked for her. Nor do these letters sufficiently explain how the Petitioner's work experience was progressive.

The Petitioner also submitted letters of recommendation from peers in the industry. A letter from [redacted] states that he has known the Petitioner since 2011 and "observed" her teaching a class of 10 students, as well as two workshops tailored to groups of approximately 150 students. No additional details were provided regarding these engagements, such as where or for whom they were conducted, the year or duration of such engagements, or the subject matter presented by the Petitioner. Another letter is from [redacted], a Surgeon-Doctor and Partner-Owner of [redacted], who claims he met the Petitioner in 2005 while she was an intern pursuing her degree. He claims that he has been forwarding and referring patients to her since 2008 based on her "unique expertise." Finally, the Petitioner submitted a letter from [redacted]

[redacted], a former client/patient, who states that the Petitioner's treatment and recommendations helped relieve the pain she was dealing with in 2008. Like the letters noted above, these letters also do not specify the amount of time the Petitioner devoted to performing physiotherapy services during the time period in question, or any defined time period during time preceding the petition's filing, nor do they demonstrate that her work experience was progressive. At best, these letters are recommendations that comment on her general experience in the field.

Finally, the Petitioner submitted an expert opinion letter prepared by [redacted] on behalf of [redacted] While the letter is intended to establish her eligibility under the three *Dhanasar* prongs, [redacted] also discussed her work experience. According to [redacted], the Petitioner initially worked as a curricular intern "during her physiotherapy years" in several hospitals and clinics in 2006, and provided home health and hospital services from 2007 to 2008, where she was hired directly by families to provide such services. While operating her [redacted] studio from 2009 onward, [redacted] states that the Petitioner served as a lecturer and instructor both independently and for [redacted] which he claims is "the biggest name in schools of Pilates in Brazil." Accordingly, he concludes that by virtue of approximately 12 years of experience in the field, she qualifies as an advanced degree professional.

While [redacted] provides a general summary of her career to date, he does not provide any details regarding the duties and services she performed during these varying periods, nor does he clarify whether such services were continuous, part-time, or full-time. Moreover, he does not discuss how the Petitioner's work experience was progressive. Further, while he states that his evaluation is "based on documents provided by [the Petitioner]" as well as his own research, he does not identify what documents he reviewed in reaching his conclusions. The regulation at 8 C.F.R. § 204.5(g) provides, in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

There is no indication that [redacted] reviewed such evidence in rendering his evaluation, and the record before us is likewise devoid of letters from former employers or trainers discussing her qualifying experience abroad. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988). USCIS is ultimately responsible for making the final determination regarding eligibility for the benefit sought. *Id.* USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795.

The record as constituted does not establish that the Petitioner qualifies as an advanced degree professional. Here, the Petitioner presented several letters from former employees and peers; however, none of the letters submitted offer a description of her duties beyond "Pilates instruction" and "physiotherapy." Moreover, none of the letters detail the duties she consistently performed between

2007 and the filing of the petition. As required under 8 C.F.R. § 204.5(g) and 8 C.F.R. § 204.5 (k)(3)(i)(B), we must rely on documents from her former employers in determining her years of experience in physiotherapy/physical therapy. Without further information and evidence from her alleged former employers, or any other entities that employed her services, the documentation in the record does not offer sufficient information to demonstrate that she has at least five years of progressive post-baccalaureate experience in physical therapy to constitute the equivalent to an advanced degree in that specialty. *See* 8 C.F.R. § 204.5(k)(2) and 8 C.F.R. § 204.5(k)(3)(i)(B). Accordingly, the record supports the Director's determination that the Petitioner has not established that she qualifies as a member of the professions holding an advanced degree.

On appeal, the Petitioner reasserts that she has more than 12 years of experience in the field of physical therapy in addition to holding the foreign equivalent of a U.S. bachelor's degree. The Petitioner submits letters from two U.S. employers, both of which claim the Petitioner has worked for them as a Pilates instructor/contractor since her arrival in the United States. While noted, the Petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1). Therefore, her most recent employment in the United States, which she commenced after the filing of the petition, will not be considered. It should also be noted that this employment is verified in the field of Pilates instruction, not her claimed specialty of physical therapy.

Finally, we note that the Petitioner submits a copy of an evaluation from the Foreign Credentialing Commission on Physical Therapy, Inc. (FCCPT) on appeal in support of the assertion that she is pursuing her physical therapy license in the United States. According to this evaluation, the Petitioner is not currently qualified to practice physical therapy in the United States. The FCCPT evaluation also notes that she did not produce a copy of her Brazilian license to practice physical therapy abroad. The record indicates that although a copy of such license was requested by the Director in the request for evidence, the Petitioner submitted only an identification card which could not be determined to be equivalent to a license to practice physical therapy in Brazil. This lack of documentation, coupled with the notations by the FCCPT, raise questions regarding the validity of her claim that she has at least five years of progressive, post-baccalaureate experience in the field of physical therapy. Given her failure to quantify the amount of time she spent managing her business and performing Pilates instruction, which are unrelated to physical therapy the claimed field of specialty, and her apparent lack of a license to work as a physical therapist in Brazil, the record as constituted does not establish that she has at least five years of post-baccalaureate experience in the specialty. Consequently, the record contains insufficient evidence to conclude that the Petitioner qualifies as a member of the professions holding an advanced degree.

B. Exceptional Ability

In denying the petition, the Director determined that the Petitioner fulfilled only one of the regulatory criteria, specifically 8 C.F.R. § 204.5(k)(3)(ii)(A) (submission of an official academic record showing that the individual has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability).

On appeal, the Petitioner does not specifically identify any erroneous conclusion of law or statement of fact relating to the Director's determinations for the remaining criteria at 8 C.F.R. § 204.5(k)(3)(ii)(B)-(F). Nor does the appeal brief even reference the Director's discussion regarding

the aforementioned criteria. Without offering specific arguments to overcome the Director's findings, the Petitioner has not established that she satisfies at least three of the criteria at 8 C.F.R. § 204.5(k)(3)(ii) and has achieved the level of expertise required for exceptional ability classification.

C. National Interest Waiver

The remaining issue is whether the Petitioner has established that a waiver of the requirement of a job offer, and thus a labor certification, is in the national interest. As previously outlined, in order to qualify for a national interest waiver, the Petitioner must first show that she qualifies for classification under section 203(b)(2)(A) of the Act as either an advanced degree professional or an individual of exceptional ability. The Petitioner has not shown that she is an advanced degree professional or that she has satisfied the regulatory criteria and achieved the level of expertise required for exceptional ability classification. As the Petitioner has not established eligibility for the underlying immigrant classification, the issue of the national interest waiver is moot.

III. CONCLUSION

The Petitioner has not established that she satisfies the regulatory requirements for classification as an advanced degree professional or as an individual of exceptional ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.